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No. 04-1332

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT C. BONNER, et al.,

Petitioners,

v.

SUSAN HALLOCK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO A PETITION FOR A WRIT FOR CERTIORARI

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QUESTION PRESENTED

28 U.S.C. § 2676, The Judgment Bar provides that a judgment in an action under § 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2679, Exclusiveness of Remedy provides, in part, that the protections from suit provided by § 1346(b) do not extend or apply to a civil action against an employee of the government which is bought for a violation of the Constitution of the United States.

The question presented is:

Whether a dismissal of a Federal Torts Claim, for lack of subject matter jurisdiction, pursuant to 28 U.S.C § 2680(c), bars a subsequent *Bivens* action by the claimant against Federal employees whose acts gave rise to the Destruction of its property.

PARTIES TO THE PROCEEDING

Petitioners are:

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET JORDON, THOMAS VIRGILLO, UNKNOWN NAMED AGENTS OF THE UNITED STATES CUSTOMS AND TREASURY, UNKNOWN AGENTS OF THE UNITED STATES JUSTICE DEPARTMENT, UNKNOWN AGENTS OF THE UNITED STATES POSTAL SERVICE, AND UNKNOWN NAMED AGENTS OF UNITED STATES MARSHALL SERVICE AND JOHN AND JANE DOE, 1 THROUGH 25.

Respondents are:

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC.,

D/B/A MULTI MEDIA TECHNOLOGY CENTER

CORPORATE DISCLOSURE STATEMENT

Comes now Respondent Ferncliff Associates Inc. and avers that has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Janise L. Miller
Attorney for Respondents

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Janise L. Miller, on behalf of respondents, respectfully submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 387 F.3d 147. The opinions of the District Courts are reported at 281 F. Supp. 2d 425 and 253 F. Supp. 2d 361.

JURSIDICTION

The judgment of the Court of Appeals was entered on October 22, 2004. An order denying a petition for rehearing was entered on January 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Torts Claim Act (FTCA) 28 U.S.C. §§ 1346(b)(1), 2671, et seq., and Amendment V of the United States Constitution are set out in an appendix to this petition.

INTRODUCTION

First and foremost, it must be noted that this entire civil action arose after the seizure of Respondents' (hereinafter Ferncliff) property pursuant to a search warrant. The search warrant stated that the items to be seized included evidence of the commission of an alleged criminal offense related to child pornography in violation of Title 18 U.S.C. §§ 2252 and 2252A. Neither Ferncliff nor any of its agents, employees, or family members have ever been charged with this offense. Unbeknownst to Ferncliff, Mr. Richard Hallock – husband of Susan Hallock, President of Ferncliff – was the victim of identity theft. As a result of the identity theft, unidentified persons unlawfully used credit card information belonging to Richard Hallock to establish a child pornography site on the internet.

Identity theft can happen to anyone as a result of using a credit card in the normal course of everyday business. Any innocent citizen has the potential of becoming a victim of identity theft for an act as innocuous as being a traveler or a consumer.

STATEMENT

On June 8, 2000, certain federal law enforcement officers, pursuant to a search warrant, searched the premises of Ferncliff and seized its business property as contraband, instrumentalities, and fruits or evidence in violation of 18 U.S.C. §§ 2252 and 2252A. The business property seized by the Federal Officers is listed as follows: all computer equipment, computer software, computer data and computer hard disk drives, which included all computerized proprietary Computer Software Design

Documents, all Computerized Accounts, Client Files, Business Files, as well as Technological Trade Secrets and Archival Backups.

On December 21, 2000, all computer equipment and computer hard drives were returned, except that four of the nine computer systems were destroyed beyond repair – totally unusable – and the loss of three of these computers necessitated the discontinuance of normal business operations of Ferncliff.

Also, five computer hard disk drives were destroyed to the point of complete loss of all stored data. This included all computerized Proprietatry Computer Software Design Documents, all Computerized Personal Records, all Computerized Business Records all Computerized Accounts, Client Files, Business Files, Technological Trade Secrets, and Archival Backup Copies. After unsuccessful attempts to restore the situation through administrative and informal channels, on July 18, 2002, Ferncliff filed a complaint for damages against the United States under the Federal Torts Claim Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671, et seq. It is undisputed that the Government filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), for *lack of subject matter jurisdiction* due to an exception to the FTCA, 28 U.S.C. § 2680(c), and Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted. The Government's 12(b)(1) motion was granted pursuant to § 2680(c) and Ferncliff's complaint was dismissed on March 24, 2003.

Prior to the dismissal of March 24, 2003, Ferncliff filed a *Bivens* action on February 13, 2003 against these Petitioners, known and unknown (hereinafter Government

Agents) all government employees involved in the destruction of Ferncliff's property. The Government Agents filed a Motion to Dismiss the *Bivens* action, alleging lack of subject matter jurisdiction pursuant to the judgment bar in 28 U.S.C. § 2676, and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

On August 20, 2003, the Trial Court ruled on the Motion to Dismiss. The Honorable David N. Hurd held:

> 1) "Because it was determined that § 2680(c) deprived the Court of subject matter jurisdiction, therefore, the dismissal was pursuant to Federal Rule of Civil Procedure 12(b)(1), and not Federal Rule of Civil Procedure 12(b)(6), and, 2) Because Plaintiffs' FTCA suit against the Government was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and allowing Plaintiffs to proceed does not offend the purpose of § 2676, the judgment bar statute does not bar Plaintiffs' *Bivens* suit."

Furthermore, the Court held that under the liberal rules for notice pleading, Ferncliff had sufficiently stated a claim for which relief may be granted.

Petitioners appealed, and the Second Circuit Court of Appeals affirmed the District Court's conclusion that § 2676 does not bar Respondents' *Bivens* claim.

The majority of the Court held that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exemption to the FTCA does not result in 'judgment in an action under § 1346(b)'" that triggers the judgment bar. The Court reasoned that there was no judgment in Respondents' prior case for purposes of § 2676 because "the action was

not properly brought under the Federal Torts Claim Act in the first place and is a nullity." According to the Court, "for the judgment bar to apply, the action must first be a proper one for consideration under the Federal Torts Claim Act." In other words, it must fit within the category of cases for which sovereign immunity has been waived. If it does not, then a judgment declaring a lack of subject matter jurisdiction denotes that Sovereign Immunity has not been waived and that the case is not justiciable in any event. Judge Marrero concurred with the majority but also offered alternative grounds for affirmation. Judge Marrero found that the term "on the merits" is implied after the word "judgment" in the Judgment Bar. The Second Circuit Court of Appeals denied the Government Agents petition for rehearing and suggestion of rehearing en banc.

SUMMARY

Respondents' Federal Torts Claim was not justiciable as Sovereign Immunity was not waived. Therefore the Judgment Bar was not applicable. In the alternative, the Judgment Bar can only be applied after an adjudication on the merits. Furthermore the Westfall Act of 1988 effectively limits the application of the Judgment Bar. The ruling of the Second Circuit is not in conflict with the rulings of any other circuits or the Supreme Court.

REASONS FOR DENYING THE PETITION

I. In harmonizing the Westfall Act with the Judgment Bar Respondents' *Bivens* claim must proceed under the facts of this particular case.

Respondent Ferncliff directs this Honorable Court's attention to the following: 1) The Judgment Bar was in effect in the year 1944; 2) *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 was decided in the year 1971; and 3) The Westfall Act amended 28 U.S.C. § 2679, exclusiveness of remedies, in the year 1988. The latter specifically states that the protections and immunities provided by the Federal Torts Claim Act do not extend or apply to any Civil action against an employee of the Government which is brought for violation of the Constitution of the United States.

In part, Ferncliff argues that the Westfall Act is controlling and that the Judgment Bar does not apply. Furthermore, Ferncliff asserts that the lower panel's ruling was correct in concluding that Ferncliff's *Bivens* complaint could not be defeated by prior dismissal of a Federal Torts Claim by reason of lack of jurisdiction where sovereign immunity was not waived.

On several occasions, the United States Supreme Court has concluded that a specific policy embodied in a later Federal Statute should control interpretation of the older Federal Statute despite that law's literal, unconditional text, and the fact that it had not been expressly amended by the later Act.

This concept was recently illustrated in the case of *United States v. Estate of Francis J. Romani, et al.*, 523 U.S. 517 (1998). In *Romani*, a third party perfected a $400,000 judgment lien and the Internal Revenue Service

filed notices of tax liens on the property afterwards. Because the property was encumbered by both the judgment lien and the Federal tax liens, the estate's Administrator sought the County Court's permission to transfer the property to the judgment creditor in lieu of execution. The Court authorized the conveyance, overruling the Federal Government's objection for the transfer arguing that it violated Federal priority statute, 31 U.S.C. § 3713(a) which provides that a Government claim "shall be paid first" when a decedent's estate cannot pay all of its debts.

The Superior Court of Pennsylvania affirmed, as did the Pennsylvania Supreme Court. The latter Court determined that there was a "plain inconsistency" between § 3713 and the Federal Tax Lien Act of 1966, which provides that a Federal Tax Lien "shall not be valid" against judgment lien creditors until a prescribed notice has been given. 26 U.S.C. § 6323(a). The Court concluded that the 1966 Act effectively limited § 3713's operation as to tax debts and noted that the 1966 Act modified the Government's preferred position in the tax area and recognized the priority of many estates claims over Federal tax liens.

Writing for an undivided Court, Justice Stevens stated that the proper inquiry is how best to harmonize the two statutes impact on a Government's power to collect delinquent taxes. In concluding that the Tax Lien Act was the governing statute, he wrote that that particular Act was the latest statute, the more specific statute, and its provisions are comprehensive, reflecting an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens. Furthermore, he concluded that it represented Congress' detailed judgments as to when the Government's claims for unpaid taxes should yield to many different sorts of interest (including, e.g., judgment

liens, mechanic's liens, and attorney's liens) and many different types of properties (including, e.g., real property, securities, and motor vehicles).

As in the case of *Romani*, *supra*, this case too is presented with a specific policy embodied in a later Federal Statute that should control interpretation of the older statute despite that law's literal, unconditional text and that the fact that it had not been expressly amended by the later Act. The judgment bar took effect in the year 1948. The Westfall Act took effect in the year 1988.[1] The Act was designed to give stronger protection from personal lawsuits against Government employees who were guilty of negligence while acting within the scope of their employment. See Congressional Record: HR-4612 – House June 27, 1988 and Congressional – Senate, October 12, 1988.

Note, however, that while making the immunities from personal suit broader and more clarid, the Act specifically states that a Civil Action may still lie against an employee of the Government, which is brought for a violation of the Constitution of the United States. See 28 § 2679(b)(2)(A).

It would be fair to say, therefore, that the Westfall Act in effect includes in part a codification of *Bivens*. A review of the Congressional Record of the House of Representatives dated June 27, 1988 at page 15963 makes it clear

[1] The Westfall Act was passed after the Supreme Court's ruling in *Westfall, et al. v. Erwin*, 484 U.S. 292 (1988) where it was held that absolute immunity does not shield official functions from state-law tort liabilities unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature.

that the Legislators were specifically concerned about the issue of Constitutional Torts.

Quoting Mr. Frank in part:

> "In January of this year, I believe, the Supreme Court decided a case in which it held employees of the Federal Government liable for common garden variety type negligent suits. This bill simply restores what we believe to have been the law. It is a status quo ante-bill that says, 'If you are working for the Federal Government and within the scope of your employment', and we have procedures for deciding that if it is in dispute, 'and you are guilty of negligence', we are not talking about intentional acts of harming people, 'if you are guilty of negligence, the Federal Government, as it has always been, will be the Defendant under the Federal Torts Claims Act procedures.
>
> We make **special provisions** (emphasis added) here to make clear that the more controversial issue of Constitutional Torts is not covered by this bill. If you are accused of having violated someone's Constitutional rights, this bill does not affect it. You might be individually sued. That depends on other factors."

Mr. Frank goes on to say:

> "... other remedies under other acts, Civil Rights Acts, are not affected at all. It is an important one to restore a sense of security to hard working and dedicated people who work for this Federal Government – at too little compensation, I must say I believe – I hope that the bill is adopted".

Also see the Congressional Record of the Senate of October 12, 1988 at page 29933 where Mr. Grassley states:

> "Mr. President, I would like to emphasize that this bill does not have any affect on the so-called *Bivens* cases or Constitutional Tort Claims. Although this too is an area of concern to me – and I have introduced corrective legislation in the past – the bill we passed today has no impact on these cases which can continue to be brought against individual Government officials."

The preservation of the Constitutional Tort is clear from the language of the Westfall Act as well as from the language in discussion in both the House of Representatives and the Senate. Ferncliff avers that the specifically embodied policy in the Westfall Act of 1988 effectively limits the application of the older Judgment Bar of 1948 under the facts of this particular case. The Westfall Act is a later statute, more specific on the issue of personal liability for Constitutional Torts, and its provisions are comprehensive reflecting an obvious attempt to accommodate the strong policy objections to violation of Constitutional Rights by Government employees.

For the above stated reasons, Ferncliff's *Bivens* complaint should stand under the protections provided by the Westfall Act of 1988 and the Judgment Bar of 1948 should be ruled inapplicable under the facts of this particular case. In taking this approach, the two statute impact – the 1948 Judgment Bar and the 1988 Westfall Act – on Ferncliff's power to present this claim are harmonized along with the landmark decision in 1971 of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. See *United States v. Estate of Francis J. Romani, et al., supra*.

As stated in *Bivens* by Justice Brennan, " . . . power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – albeit Unconstitutionally – in the name of the United States possesses a far greater capacity for harm then an individual trespasser exercising no authority other than his own." For the above stated reasons, Ferncliff's *Bivens* claim should proceed and writ of certiorari should be denied.

II. The Second Circuit Decision is not in error.

The majority opinion, Judges Miner and Raggi, held that an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of Sovereign Immunity provided by the FTCA does not result in a " . . . judgment in an action under § 1346(b)" [the Federal Torts Claim Act]. 28 U.S.C. § 2676. The majority decided that the action was not properly brought *under* the Federal Torts Claim Act in the first place and is a nullity. They reasoned that for the Judgment Bar to apply, the action must fit in the category of cases for which Sovereign Immunity has been waived. Sovereign Immunity had not been waived and Ferncliff's Federal Torts Claim was not justiciable in any event. Therefore the Judgment Bar did not apply.

The Supreme Court considered "justiciability" in the case of *Baker v. Carr*, 369 U.S. 186 (1962).

We quote:

> "In the instance of non-justiciability, consideration of a cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the

> duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted, can be judicially molded. In the instance of lack of jurisdiction, the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other innumerated acts of ART III, § 2), or is not a 'cause or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute."

Ferncliff's Federal Torts Claim was truly non-justiciable according to the rationale of the majority of the lower panel as well as according to the definition of that term as held in *Baker v. Carr*. The reasoning of the majority of the lower panel is sound. Sovereign Immunity had not been waived for Ferncliff's original Federal Torts Claim due to the § 2680(c) custom exception. Ferncliff's claim did not *arise under* any Federal Statute as Sovereign Immunity was not waived. Furthermore, Ferncliff's original Federal Torts Claim was not a *cause or controversy* within the meaning of the Federal Torts Claim Act.

In a separate concurring opinion, Justice Marrero not only concurs with the majority opinion but also offers alternative grounds for affirmation that he found to be even more compelling. Justice Marrero found that like the District Court in this particular case, the term "on the merits" is implied after the word "judgment" in the Judgment Bar. In bolstering his decision, Justice Marrero sites *Michalik v. Hermann*, No. Civ. A. 99-3496, 2002 WL 31844910 (E.D. La. Dec. 16, 2002).

In *Michalik*, Plaintiffs were detained during a drug sting operation while the home was searched. The Plaintiffs alleged their home was searched in error because the

officers relied upon outdated or stale information to determine that their drug suspect resided at Plaintiff's address. The Defendants argued that the *Bivens* complaint should be dismissed by reason of the Judgment Bar provision of 28 U.S.C. § 2676. That Court held that where a decision was favorable to the United States in a Federal Tort Claim because of a procedural defect in the Plaintiff's complaints and had nothing to do with the merits of the claim, the Judgment Bar would not apply.[3]

Paraphrasing Judge Hurd, of the Northern District, to demonstrate the potential destructiveness of the Government Agents' interpretation of § 2676, consider the following example. Plaintiff files suit in a Federal District Court alleging a FTCA claim against the Government and a *Bivens* claim against individual Government employees allegedly involved in the deprivation of Plaintiff's Constitutional Rights. The Government quickly files a motion to dismiss for lack of subject matter jurisdiction, contending that sovereign immunity was not waived on the particular facts before the Court. The Court agrees with the Government, dismissing the claim against the Government and entering judgment in its favor. The Defendants thereafter, move to dismiss the claims against them, contending that this judgment, pursuant to § 2676, bars suit against them.

Under Government Agents' interpretation of the statute, the Defendants' motion would be granted, despite the fact that no repetitious litigation transpired, the

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[3] In a later opinion, *Michalik v. Hermann*, No. Civ. A. 99-3496 2003 WL 21805037 (E.D. La. Aug. 4, 2003), the Court pointed out that Plaintiffs had failed to preserve their Federal Tort Claim by reason of non-compliance with the notification requirements of 28 U.S.C. § 2401(b).

merits of the claims against the Government were not reached, the claims against the Defendants were brought in the same lawsuit, and despite the fact that no possibility of dual recovery is presented.

In this scenario, Plaintiff's earlier dismissal of its claims against the United States for lack of subject matter jurisdiction (sovereign immunity) would prevent it from pursuing enforcement of its Constitutionally guaranteed substantive rights (also guaranteed under § 2679(b)(2)(A)) against the proper Defendants in their individual capacities under a *Bivens* claim. Clearly Government Agents' interpretation of § 2676 must be rejected as such would deprive the Plaintiff of its ability to pursue remedies for violations of its Constitutional rights.

It is true that one Circuit has opined that claims against the Government and individual employees would best be brought in the same claim [e.g. *Gasho v. United States of America*, 39 F.3d 1420 (9th Cir. 1994)]. However, as pointed out by Judge Hurd, the filing of claims against both the Government and its employees in the same lawsuit is not statutorily required. [MEMORANDUM – DECISION and ORDER.[FN4]]

Government Agents under the cloak of federal statutory authority and color of law, have deprived Ferncliff of its property in violation of the Constitution resulting in substantial damages as a consequence in an amount in excess of $4,000,000. The necessity and appropriateness of judicial review is no less compelling for Ferncliff than it was in the case of Webster Bivens.

The Second Circuit majority opinion holds that where jurisdiction under the FTCA is improperly invoked, the judgment bar does not apply as the original cause of action

is a nullity and is non-justiciable. The concurring point of view accepts this conclusion and expands upon it by arguing that in order to invoke the Judgment Bar the original Federal Torts Claim must have been adjudicated on the merits. Either way, the Judgment Bar should not be held to preclude Ferncliff's *Bivens* claim in this instant case for the above stated reasons.

III. The Ruling in the Second Circuit is not in conflict with Decisions of the Seventh, Ninth and Tenth Circuits.

The Government Agents in their briefs have argued that the panel's decision squarely conflicts with the decision of the Tenth Circuit and rely on *Farmer v. Perrill*, 275 F.3d 958 (10th Cir. 2001). Farmer filed a *Bivens* action against numerous prison employees for failing to treat his transexualism. Presumably, Farmer's previous Federal Tort Claim was properly brought under the FTCA and was subject to its restrictions.

Sovereign Immunity was not waived and subject matter jurisdiction was proper unlike the present situation. That action was defeated pursuant to a motion under Federal Civil Procedure 41(b) for failure of the Plaintiff to prosecute. It was held in *Farmer* that the Judgment Bar did preclude the *Bivens* claim because dismissal pursuant to Rule 41(b) constituted an adjudication on the merits. Defendant Government Agents cannot rely on *Farmer* as there was no issue of subject matter jurisdiction and as it was decided on the merits.

The Government Agents also rely on *Gasho v. United States of America*, 39 F.3d 1420 (9th Cir. 1994), where the Plaintiffs sued for emotional distress stemming from the

seizure of their airplane, pursuant to Arizona State Law that permits suing for emotional distress, as well as for false arrest and false imprisonment. Jurisdiction was proper for emotional distress claims since 28 U.S.C. § 1346, "law of the place", permitted the same. Upon completion of depositions and other discovery, summary judgment was granted on the Federal Torts Claim for the United States on all counts. The Gashos then filed a *Bivens* Action against the custom's agents claiming that the aircraft seizure and personal arrests violated their 4th and 5th Amendment Rights.

The District Court dismissed that *Bivens* Action pursuant to § 2676. In exercising its jurisdiction over both of the Gashos' appeals, summary judgment as to emotional distress, secondary to the seizure of the airplane was upheld in favor of the Government by the Ninth Circuit since it was claimed that it stemmed from the statutory exception provided by § 2680(c). Again, the Government Agents erroneously relied on *Gasho* where Sovereign Immunity was not waived since summary judgment is clearly an adjudication on the merits. *Sopp v. Gehrlin*, 6 F. Supp. 823 (WDPA 1964).

Gasho is further distinguished from the case at bar by the fact that the right to be free from emotional distress would simply not support a *Bivens* claim since said right is not guaranteed by the Constitution of the United States. However, the deprivation of property without due process is prohibited by the Constitution and the Westfall Act. 28 § 2679(b)(2)(A).

The Government Agents further rely on *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996). First, in *Hoosier Bancorp*, the Seventh Circuit

concluded that Plaintiff's *Bivens* Action was barred by the Statute of Limitations. The Court then went on to hold that the § 2676 Judgment Bar precluded Plaintiff's *Bivens* Action after its Federal Torts Claim was dismissed for lack of subject matter jurisdiction pursuant to § 2680(a) – the discretionary exception of the Federal Torts Claim Act.

First, the Seventh Circuit had already decided that the *Bivens* Claim was precluded by the Statute of Limitations. Any further discussion in regard to the Judgment Bar was mere dicta as that discussion did not address the issue of the Statute of Limitations. A claim barred by the Statute of Limitations is an adjudication on the merits.

Second, as Ferncliff addresses said dicta, the Seventh Circuit neither considered nor correctly applied the principal of justiciability as stated by the majority of the panel as well as in *Baker v. Carr*, *supra*. An analysis of the principle of justiciability as held in Baker is germaine to determining whether a claim would be precluded by the Judgment Bar.

Third, the Seventh Circuit as pointed out by Judge Hurd of the Northern District, did not address the issue presented here: i.e., the legal effect of dismissal for lack of subject matter jurisdiction under § 2676 [MEMORANDUM – DECISION and ORDER[FN3]].

To follow the dicta of *Hoosier Bancorp* would be tantamount to emasculating judicial recognition of a cause of action implied directly under a Constitutional provision and first stated in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) and codified by the Westfall Act.

Constitutionally protected rights cannot be circumvented by an erroneous application of the § 2676 Judgment Bar which would conflict with the Constitution's safeguards provided by the Westfall Act, Amendment V, and *Bivens*. However viewed, absent justiciability in accordance with *Baker* or absent adjudication on the merits, the § 2676 Judgment Bar cannot be applied in a manner so as to deprive Ferncliff of Constitutionally and statutorily protected rights.

IV. The Second Circuit ruling in this instant action is consistent with previous rulings of the Second Circuit, Other Circuits, and the Supreme Court.

First, the panel decision is not in conflict with other decisions of the Second Circuit. The Second Circuit has not ruled that a dismissal based on the Statute of Limitations is a dismissal for lack of subject matter jurisdiction. The majority, **in dicta**, opined that where an action is *properly* pled under the FTCA, a judgment of dismissal based on the Statute of Limitations would justify the assertion of the Judgment Bar on a subsequent *Bivens* Action. Any alleged application of the Panel's dicta by the Government Agents fails to address the true issue that was before the Court. Clearly the Government Agents statement regarding said dicta is a misstatement of the law.

The Statute of Limitations defense has been addressed by the Courts via various statutory provisions. In *Closed Circuit Corporation of America v. Jerrold Electronics Capital Corporation*, 426 F.Supp 361 (EDPA 1977), Plaintiff sued Defendant for the alleged fraudulent sale of faulty electronic equipment. Having found no evidence of fraud outside of bare allegations, the court applied the

four year statute of limitations and ruled the action was time barred. In doing so the court noted that while the statute of limitations defense was an affirmative defense [Rule 8], the defense could still be properly disposed of under Rule 12(b)(6) – thus an adjudication on the merits.

In *Gordon v. National Youth Work Alliance*, 675 F.2d 356 (US App DC 1982), the timeliness of Plaintiff's right to pursue her EEOC claim (90-day rule) was in question. The Court noted that Statute of Limitations generally created an affirmative defense; and, that affirmative defenses when raised pursuant to Rule 12 should be pled under Rule 12(b)(6) and not Rule 12(b)(1). Again, Rule 12(b)(6), failure to state a claim, is an adjudication on the merits.

Moreover in *Leavell v. Kieffer*, 189 F.3d 492 (7th cir. 1999), where plaintiff brought a *Bivens* action against a tax auditor by reason of unfavorable testimony at trial, the District Court dismissed based on the statute of limitations defense and applied Rule 12(b)(1). However Rule 12(b)(1) addresses the justiciability of a claim. On appeal the Seventh Circuit affirmed the Statute of Limitations defense but held that Rule 12(c), judgment on the pleadings, applied-not Rule 12(b)(1), as applied by the lower Court. The Court pointed out that the Statute of Limitations defense in no manner affects the District Court's jurisdiction. Jurisdiction is supplied by 28 U.S.C § 1331 because a *Bivens* claim presents a Federal question.

In any event, the cases cited by the Government Agents do not support in any way that dismissal based on the Statute of Limitations is a dismissal for lack of jurisdiction. Both *Johnson v. The Smithsonian Institution*, 189 F.3d 180 (2nd Cir. 1999) and *Millares Guiraldes de Tineo v.*

United States, 137 F.3d 715 (2nd Cir. 1998) were dismissed for lack of subject matter jurisdiction due to the failure of the satisfaction of ante litem notice requirements under § 2401(b) and §§ 2401(b), 2675(b) respectively.

Johnson commenced action against the Smithsonian Institution asserting conversion and replevin claims in an attempt to recover artwork created by his uncle, *William Johnson*, that was in the possession of the Smithsonian Institution. The claims were dismissed on the grounds that the Plaintiff failed to comply with the FTCA's jurisdictional requirement under § 2401(b) – that a formal administrative claim seeking a sum certain be filed within two years after the contested injury accrued.

Because these notification requirements were not met, it was held that the District Court lacked subject matter jurisdiction to consider the claim. The issue addressed in *Johnson* was the failure to satisfy the requirements of § 2401(b) and not the issue of a Statute of Limitations. The Government Agents cannot rely on *Johnson* to support their contention that a Statute of Limitations defense is a dismissal for lack of jurisdiction. The holding in *Johnson* does not in any way contradict the ruling by the Second Circuit in *Hallock v. Bonner*.

In *Millares Guiraldes de Tineo v. United States*, *supra*, a DEA Agent was arrested for possession of cocaine in Bolivia while working as a confidential informant for the DEA Office in Lapas, Bolivia. Following her release, Millares presented the DEA with a document entitled "MEMORY AID AND PROPOSITION". The "Memory Aid" requested reimbursement for expenses and indemnity. At her deposition in the action, Millares testified that the amount in question was $38,000.

Some three years after her initial arrest, Millares presented to the DEA claims on Government Standard Form 95 requesting damages for unjust arrest and false imprisonment for amounts of over $1,000,000. The Court held that the "Memory Aid" did not satisfy the requirements of § 2675(b) and § 2401(b) inasmuch as it only requested reimbursement for "the expenses incurred". There was no mention of any request for compensation for false imprisonment or emotional suffering.

The Court also noted that that the Standard Form Claim, Form 95, was not filed until more than two years after the claim's accrual. Hence, the Standard Form Claims did not meet the time limitation imposed by the FTCA. The Court held that since the *notification requirements* of the Federal Torts Claim Act had not been met, the Court lacked subject matter jurisdiction.

Again, in *Millares*, *supra*, the issue before the Court was whether certain notification requirements of the FTCA had been met. As they were not, the Court lacked subject matter jurisdiction. The issue was not the Statute of Limitations but the failure to give timely notice as required by the Federal Tort Claim Act. The Government Agents cannot rely on *Millares* to support their contention that a Statute of Limitations defense is a dismissal for lack of jurisdiction. *Millares* is not in conflict with the holding of this Court in *Hallock v. Bonner*.

Furthermore, the ruling by the Second Circuit is not in conflict with any ruling by the Supreme Court of the United States. The Government Agents' attempt to rely on *United States v. Smith*, 499 U.S. 160 (1991) is misplaced. In *Smith*, Plaintiffs alleged medical malpractice on the part of an Army doctor who delivered their brain damaged child in the

United States Army Hospital in Vicenza, Italy. The Plaintiffs filed an action against the doctor concerned in his individual capacity. The Ninth Circuit held that because § 2680(k) of the FTCA precluded any remedy against the Government in cases arising from injuries incurred abroad, the Tort Claim Act against the individual doctor was not barred by the Westfall Act (a.k.a. Federal Employees Liability Reform and Tort Compensation Act of 1988). In reversing the Ninth Circuit, the Supreme Court held that the Westfall Act specifically was designed for this particular type of issue and that the Westfall Act precluded a lawsuit against the physician in his individual capacity.

However, the Government Agents, cannot rely on *Smith* for the proposition that a *Bivens* claim may not be brought after a Federal Tort Claim is dismissed where the Government has not waived Sovereign Immunity. The Westfall Act specifically preserves the *Bivens* claim as stated earlier in this brief in § 2679(b)(2)(A). It specifically memorializes a Plaintiff's right to bring an action for violation of a Constitutional provision in face of the fact that the Federal Tort Claim Act would not otherwise permit same.

Again, the Government Agents may not rely on *Smith, supra*. *Smith* is clearly distinguished from the instant case. *Smith* complained of personal injury and not of deprivation of a Constitutional Right. *Smith* alleged no *Bivens* complaint. Medical malpractice is not tantamount to violating any protected rights guaranteed by the United States Constitution and the Bill of Rights. A medical malpractice claim is an action for negligence and does not constitute a Government action prohibited by the Constitution or by Federal Statute. *Smith* is inapplicable. In the case of *Hallock v. Bonner* there is a palpable claim that the Government Agents violated the Constitutionally protected

rights of Plaintiffs and deprived them of their property without due process.

Further, the Petitioners cite *FDIC v. Myer*, 510 U.S. 471 (1994) in support of their contention that the Second Circuit was in error. Myer filed a *Bivens* claim against the FDIC for alleged wrongful termination of employment as the senior manager of a failed thrift institution.

In *Myer,* this Honorable Court ruled on both of his claims. First it held that the United States had not rendered itself liable under § 1346(b) for Constitutional tort claims. Second it held that a *Bivens* claim could not be extended to a Government Agency.

Ferncliff is not claiming jurisdiction under § 1346(b). Ferncliff claims jurisdiction under *Bivens*, the Westfall Act, § 1331 and the Fifth Amendment of the United States Constitution. Ferncliff is not suing a Federal agency. Ferncliff is suing any and all proper parties to a *Bivens* claim.

CONCLUSION

For the above stated reasons, Petitioners' writ of certiorari should be DENIED.

Respectfully submitted,

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APPENDIX A

§ 1346(b)(1) United States as Defendant

Subject to the provisions of chapter 171 of this title, the District Courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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§ 2676 Judgment As Bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter against the employee of the government whose act or omission gave rise to the claim. (June 25, 1948, c. 646 Stat. 984.)

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§ 2679 Exclusiveness of Remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising of resulting from the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employees whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought under for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

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§ 2680 Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(c) Any claim arising in respect to the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property

by any officer of customs or excise or any other law enforcement officer; except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise of any other law enforcement officer, if –

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(3) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law . . . [1]

Federal Rule of Civil Procedure 41(b)

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

U.S. CONSTITUTION: FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.